

1 Edward S. Zusman (SBN 154366)
2 Kevin K. Eng (SBN 209036)
3 MARKUN ZUSMAN & COMPTON, LLP
4 465 California Street, Suite 500
5 San Francisco, CA 94104
Telephone: (415) 438-4515
Facsimile: (415) 434-4505

5 Attorneys for Plaintiffs

FILED

JUN X 6 2006

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

6

7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10

11 BRIANT CHUN-HOON and CARLO
12 GUGLIELMINO,

13 Plaintiffs,

14 v.

15 MCKEE FOODS CORPORATION, a
Tennessee corporation; and DOES 1 though
16 100, inclusive,

17 Defendants.

Case No. C05-00620 VRW

~~PROPOSED~~ ORDER PROVISIONALLY
CERTIFYING A DAMAGES CLASS
UNDER RULE 23(b)(3)

18

19 This matter came before the Court for hearing on April 13, 2006, upon Plaintiffs' Motion
20 for Class Certification, the evidence submitted by the parties with respect thereto, and the briefs
21 and argument of counsel. A transcript of the hearing has been prepared and is incorporated herein
22 by reference. For the reasons stated during the hearing, the Court makes the following
23 provisional determination:

24 Federal Rule of Civil Procedure 23(a) sets forth the preliminary requirements for certifying
25 a class action: (1) the class must be so numerous that joinder of all members is impractical;
26 (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the
27 representative parties must be typical of the claims or defenses of the class; and (4) the
28 representative parties must be able fairly and adequately to protect the interests of the class.

1 In addition to satisfying the Rule 23(a) prerequisites, the class must also satisfy one of the
2 three alternatives listed under Rule 23(b). In this case, Plaintiffs seek to proceed under Rule
3 23(b)(1), (b)(2), and (b)(3).

4 Plaintiffs, of course, bear the burden of demonstrating that they have satisfied all four
5 23(a) elements and at least one of the 23(b) alternatives. Failure to carry the burden on any Rule
6 23 requirement precludes certification of a class.

7 In determining the propriety of a class action, the question is not whether the plaintiff or
8 plaintiffs have stated a cause of action or will prevail on the merits. Rather, the question is
9 whether the requirements of Rule 23 are met. The Court is at liberty to consider evidence which
10 goes to the requirements of Rule 23, even though the evidence may also relate to the underlying
11 merits of the case.

12 Plaintiffs assert that they meet all of the requirements of Rule 23(a). Defendant McKee
13 Foods Corporation ("McKee") contends that Plaintiffs have met none of these four requirements.

14 Taking each of the Rule 23(a) factors in turn, the Court concludes first that the proposed
15 class, which includes approximately 200 members, is sufficiently large to satisfy the numerosity
16 requirement of Rule 23(a)(1).

17 Second, the Court concludes that the commonality requirement is met to satisfy Rule
18 23(a)(2). The existence of shared legal issues with divergent factual allegations is sufficient, as is
19 a common core of salient facts coupled with disparate legal remedies within the class. Here, the
20 Plaintiffs allege that all class members were employees of McKee and were improperly denied
21 overtime compensation because McKee misclassified the class members as independent
22 contractors in violation of the California Labor Code. Accordingly, all class members' claims
23 share these common questions of law and fact.

24 Third, the Court must examine whether Plaintiffs have satisfied the typicality requirement
25 of Rule 23(a)(3). Plaintiffs contend that their injuries arise from the same course of conduct that
26 would affect other distributors and that their claims turn on similar legal arguments.

27 This issue is whether McKee improperly classified its distributors as independent
28 contractors. McKee counters that the named Plaintiffs are former distributors who seek to

1 represent a class including current distributors, and that Plaintiffs have not proffered a single
 2 declaration from any current or former distributor who also seeks to challenge McKee's treatment
 3 of distributors as independent contractors.

4 In the Court's view, the fact that the named Plaintiffs are former, rather than present or
 5 current distributors, is not sufficient for the Court to conclude that the named Plaintiffs' claims
 6 are not typical of the claims that have been made for money damages by both current and former
 7 distributors. It may well be that former distributors are inadequate class representatives with
 8 respect to injunctive and declaratory relief claims. But the interest of former and current
 9 distributors in a damages recovery for past violations would be the same.

10 Hence, the Court concludes that the typicality requirement of Rule 23(a)(3) has been
 11 satisfied. This conclusion also satisfies the fourth Rule 23(a) factor: adequacy of the named
 12 representatives to represent the class.

13 Accordingly, the Court concludes that the four requirements of Rule 23(a) have been
 14 satisfied and turns to the Rule 23(b) criteria.

15 Plaintiffs seek to proceed under all three of the Rule 23(b) subparts. But first the Court
 16 turns to Rule 23(b)(3), which authorizes the Court to certify a class action if questions of fact or
 17 law common to the members of the class predominate over questions affecting only individual
 18 members and the class action is superior to other available methods for the fair and efficient
 19 adjudication of the controversy.

20 To satisfy the predominance requirement, the Plaintiffs must provide sufficient evidence
 21 to demonstrate that common questions will predominate over individual questions in determining
 22 whether McKee has misclassified its distributors as independent contractors. In short, Plaintiffs
 23 must satisfy the Court that there is sufficient evidence to demonstrate that the distributors share
 24 relevant common characteristics regarding their employment status so that these common
 25 characteristics predominate over individual characteristics.

26 Under California law, the principal test of an employment relationship is whether the
 27 person to whom service is rendered has the right to control the manner and means of
 28 accomplishing the result desired. That is, of course, the test of the *Borello* case.

1 Courts have recognized several indicia of the nature of a service relationship, including
 2 whether an employer has the right to discharge at will without cause. There are a number of
 3 secondary factors. The Court will not go into those in detail. Suffice it to say that they are set
 4 forth in the *Borello* case and in other cases of the California courts. But, generally, the individual
 5 factors cannot be applied mechanically as separate tests. They are intertwined, and their weight
 6 depends often on particular combinations.

7 Considering the factors specified in *Borello*, and in the other cases interpreting California
 8 law, while remaining mindful that the Court's task is not to evaluate the merits of Plaintiffs'
 9 claims at this stage, the Court concludes that Plaintiffs have demonstrated that common questions
 10 predominate in this case.

11 Plaintiffs have supplied sufficient evidence to demonstrate the predominance of relevant
 12 common characteristics among class members. For example, Plaintiffs have provided evidence
 13 indicating that all putative class members sign the same distribution agreements under which
 14 Plaintiffs now sue.

15 Plaintiffs have produced evidence that ~~all~~^{most} distributors received a booklet entitled "Doing
 16 Business with McKee" which provides distributors with information on various aspects of their
 17 dealings with McKee Foods. This 35-page booklet provides detailed guidance regarding receipt
 18 of deliveries, distributors' relationships with independent distributor warehouses, warehouse
 19 location considerations, distributor payment procedures and a complaint response plan.

20 Plaintiffs have also produced a booklet entitled "Marketing Suggestions" that ~~all~~^{most}
 21 distributors also allegedly received and that suggests various marketing strategies to distributors.

22 McKee contends that the suggestions of these booklets do not rise to the level of
 23 supervision. Although McKee may well be found ultimately to be correct on this argument, this
 24 argument is not relevant at the class certification stage. The very fact that ~~all~~^{most} distributors
 25 apparently received these booklets arguably constitutes a type of supervision or control over
 26 Plaintiffs that is sufficient to show that common issues exist among class members regarding the
 27 level of training that they received.

28 Under Rule 23(b)(3), the Court must also evaluate whether a class action is superior to

1 other means of adjudication and does so by examining four factors: the interest of each class
 2 member in individually controlling the prosecution or defense of separate actions; the extent and
 3 nature of any litigation concerning the controversy already commenced by or against the class;
 4 the desirability of concentrating the litigation of the claims in a particular forum; and the
 5 difficulties likely to be encountered in management of a class action.

6 Relevant to examination of these factors is a comparative evaluation of alternative
 7 methods of resolving the dispute. In this case, McKee has produced the declarations from some
 8 39 current distributors who apparently challenge proceeding with the class claims at bar. In this
 9 connection, the Court notes that 39 out of a class of 200 is not itself large enough to jeopardize
 10 the superiority of proceeding with a class action in this case. Consequently, the fact that there
 11 may be a certain number of individuals who do not wish to proceed with this class action is not
 12 sufficient to demonstrate that proceeding with a class action in this case is not superior to other
 13 means of adjudication.

14 The other superiority factors would not also appear to pose an obstacle to proceeding with
 15 a Rule 23(b)(3) class action. Management of an action of the size of the present class would not
 16 appear to be impractical, or even particularly difficult. There would be no particular notice
 17 problems here. The individuals who are class members presumably can be identified from
 18 current records of the parties, and so there would not appear to be any management issues
 19 peculiar to this case that would preclude proceeding with a damages class under Rule 23(b)(3).

20 By contrast, however, the situation is different when it comes to certifying a class under
 21 Federal Rule of Civil Procedure 23(b)(1) and (b)(2). Here, there does appear to be a conflict
 22 between the interests of the class representatives and the class that has been asserted.

23 The class representatives are former distributors of McKee, whereas the class embraces
 24 both former and current distributors. That poses a problem, because the former distributors do
 25 not have the same interests with respect to a continuing relationship with McKee that some
 26 members of the class would have.

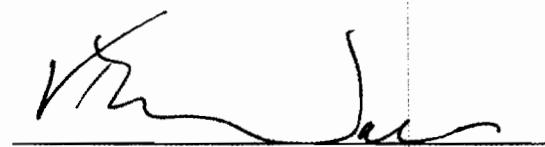
27 Consequently, because of this conflict or at least tension between the interests of the class
 28 representatives and substantial segments of the class, it would not be appropriate provisionally to

1 certify a class under Rule 23(b)(1) or 23(b)(2).

2 Accordingly, the Court provisionally certifies Plaintiffs' proposed class of all residents of
3 California who entered into Distributorship Agreements with McKee subsequent to December 31,
4 2000. The class is provisionally certified under Fed. R. Civ. P. 23(b)(3) for purposes of the
5 claims for damages asserted in the Complaint and not pursuant to Fed. R. Civ. P. 23(b)(1) or (2)
6 for any of the other relief sought in the Complaint.

7 IT IS SO ORDERED.

8
9 Dated: 06 JUN 2006, 2006



10 Vaughn R. Walker
11 United States District Judge
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28